STATE OF MICHIGAN
in the
MICHIGAN SUPREME COURT

Teri Rohde, Brendon Quilter, Mary Quilter, Walter Mackey, Barbara Mackey, Gary Gibson, Ellen Gibson, Ted Jungkuntz, Loise Jungkuntz, David Sponseller, Mary Sponseller, Mike Gladieux, Martha Gladieux, Helen Rysse, and Terry Trombley, John and Therese Williams, Plaintiffs, Appellants v. Ann Arbor Public Schools a/k/a The Public Schools of the City of Ann Arbor, Board of Education, Ann Arbor Public Schools, Karen Cross, in her official capacity as President of the Board of Education for Ann Arbor Public Schools; and Glenn Nelson, in his official capacity as Treasurer of the Board of Education for Ann Arbor Public Schools. Defendants, Appellees and Ann Arbor Education Association, MEA/NEA Intervening Defendant, Appellee	Supreme Court No. 128768 Court of Appeals No. 253565 Washtenaw County Circuit Court No. 03-1046-CZ Reply To AAPS' Opposition To Plaintiffs/Appellants' Application For Leave To Appeal

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reply

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PLAINTIFFS/APPELLANTS' REPLY TO APPELLEE, ANN ARBOR PUBLIC SCHOOLS' RESPONSE IN OPPOSITION TO THE APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN SUPREME COURT PURSUANT TO MCR 7.302(B)(1)-(3).

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INTRODUCTION

This Court should reject Appellee AAPS's transparent effort to avoid the merits of Rohde's Application For Leave To Appeal because Rohde's Application presents important issues of state law that merit immediate consideration. State law plainly authorizes Rohde's suit to challenge AAPS' unlawful use of public funds to purchase same-sex "domestic partner" benefits, the Court of Appeals has placed insupportable limitations on the statute (impeding the statutory purpose), and the result in this case is to undermine the constitution and laws of this state which plainly prevent the recognition of same sex "domestic partnerships" for purpose of providing benefits purchased with public funds. AAPS' efforts to deny the importance of the questions Rohde presents defy commonsense and logic, turn on tendentious arguments belied by their own actions, and serve no higher goal than pointless procedural delay. For these reasons, explained further below, Rohde respectfully requests that this Supreme Court grant her Application For Leave To Appeal.

I. Rohde's Application Gives Good Grounds For Review.

AAPS' cavils about the grounds for Rohde's Application amount to nothing more than self-serving mischaracterizations. As an initial matter, the notion that this Court's plenary review can be limited by the lower courts is plainly wrong. See AAPS Response at 2 (hereinafter "Resp."). In fact AAPS acknowledges (as it must), that review is at this Court's discretion, see Resp. at 8, and this Court's rules make explicit its inherent authority to review and provide relief to the full extent of its power as the Supreme Court of this state. See MCR 7.316. Under these circumstances, AAPS' claim concerning the only issues "appropriate for review" are those decided by lower courts, see Resp. at 11, is wholly untenable. Indeed, this Court exercises its plenary authority to resolve disputes promptly where, as here, the issue is one of law and the facts necessary for its resolution

have been presented. *See e.g. People v. Reed*, 449 Mich. 375 (1995)(deciding ineffective assistance of counsel argument without remand to lower courts); *Koski v. Vohs*, 426 Mich. 424 (1986)(Court ruling on question of probable cause because question was one of law). It must be this way for AAPS' view of the matter, if taken seriously, would make lower courts the master of this Supreme Court's jurisdiction.

Likewise, AAPS' effort to avoid the application of Article I, §25 by asserting that Rohde's reference to the amendment presents a new "claim" is meritless. As Rohde demonstrated to the Court of Appeals, her "claim" is the same now as it was the day she filed suit, i.e., that AAPS' policy defining, recognizing, and subsidizing same-sex "domestic partnership" benefits is contrary to state law. Rohde raised §25 in the Court of Appeals because it took effect while this case was pending and, as such, became supplemental (and controlling) authority–which is why the Court of Appeals denied AAPS' motion to strike the supplemental authority, a decision which is law of the case given AAPS' failure to seek review. *Cf. Johnson v. White*, 430 Mich 47 (1988)(law of the case doctrine barred Court of Appeals from revisiting issues decided in initial decision on remand from Supreme Court where Supreme Court did not grant leave on those issues); *see also Hadfield v. Oakland County Drain Comm.*, 218 Mich. App. 351, 356 (1996)("If a party disagrees with this Court's ruling on appeal it should seek rehearing or leave to appeal to the Supreme Court....") . Furthermore, it is fundamental that courts have a duty to apply the law as it exists at the time a decision is rendered. *See e.g. Mayor of Detroit*, 258 Mich Ap. 48, 65-66 (2003) (Court obliged to apply statutory amendments that became effective while case was pending on appeal).

Similarly, it is ludicrous to suggest that applying §25 to this case would constitute "judicial activism." Resp. at 2. Quite the contrary, to apply §25 (itself the product of initiative and

amendment processes which are the epitome of direct democracy), would be to respect the will of the people embodied in that amendment. It is AAPS, not Rohde, which urges judicial activism–albeit masquerading as restraint–in the form of an unjustifiable retreat from the straightforward application of §25 called for by Rohde's claim. Indeed, the course AAPS' urges is downright risible when one considers AAPS' suggested alternative: this Court should delay in favor of the Ingham County Circuit Court or a federal district court (which is not the authoritative expositor of state law). See AAPS at 2, 7. In any event, the latter excuse is no longer available to AAPS because, tellingly, the federal case was voluntarily dismissed (the utter absence of any non-frivolous federal claim is discussed below). See Exhibit A. As to the former excuse, Rohde suggests that AAPS has it backwards precisely because this Supreme Court provides controlling guidance to the Circuit Courts of this state.

Finally, it is clear that AAPS' current effort to avoid review based on lack of a record , see Resp. at 12-14, is belied by its own words and actions. AAPS moved for summary judgment in the Circuit Court arguing that Rohde's claim failed *as a matter of law*; and even before this Court it does not deny the material features of its same-sex domestic partnership benefits policy. See Resp. at 3 n. 1. As demonstrated in Rohde's Application, these indisputable facts demonstrate that AAPS' policy is contrary to state law, which is why AAPS points to no facts that are at issue but argues, instead, that Rohde's claim fails *as a matter of law*. See Resp. at 14-34. Thus, there is no need for a remand to decide the questions presented by Rohde's Application, which are questions of law that will be reviewed *de novo* in any event. See Resp. at 8. Under these circumstances a remand would only produce further expense and delay–undermining the "just, speedy, and economical determination of every action" which this Court strives to promote. See MCR 1.105.

For all these reasons it is evident that AAPS' scattershot attack on the grounds for Rohde's Application reduce to self-serving assertions. AAPS can assert that the circumstances under which taxpayers can prevent unlawful expenditures is not a question of public interest, or that the Court of Appeals' interpretation of MCL 129.61 effectively invalidates the statute as applied, but Rohde sees these issues as vitally important to the public interest. And AAPS does not even pretend to suggest that Rohde's questions concerning its decision to define, recognize, and subsidize same-sex "domestic partnerships" does not provide good grounds for review but offers only (groundless) arguments that review should be delayed because of question-dodging in the lower courts, which is plainly wrong for the reasons stated above.

II. Rohde Has Standing Under The Plain Language Of MCL 129.61.

AAPS provides no real response to Rohde's claim that the Court of Appeals interpretation of MCL 129.61 contradicts the plain language of the statute but attempts to buttress the poor reasoning Rohde seeks leave to appeal from (while using footnotes to raise makeweight arguments). At the outset, AAPS's "plain meaning" argument is nothing more than an effort to conflate the first definition of demand cited by the Court of Appeals ("to ask for with proper authority"), with the second definition ("to claim as of right"), for no other reason than AAPS says so, a technique reminiscent of Orwell's 1984. See Resp. at 15. AAPS' other main argument turns on the absurd proposition that the purpose of the statute is to demand a lawsuit–not halt the unlawful expenditure–and it never explains why the statute should be interpreted to require notice to the treasurer (not the board) demanding the treasurer to sue the board (from which the treasurer takes its orders)–as opposed to a request that the Board halt the illegal expenditure. See Resp. at p. 16. AAPS' assertion that Rohde did not meet the requirements of MCL 129.61 because the letters were

not attached to the Complaint is humorous given the slavish literalism it advocates elsewhere: after all the statute does not require Rohde to attach the letters or, for that matter, cite the statute. See Resp. at 15 n. 5, 16. And AAPS never explains why Rohde's request is somehow defeated by her request that AAPS investigate the scope of expenditures–or how the statute supports this argument. See Resp. at 15-16.

AAPS's remaining arguments are truly makeweight and, if accepted, would represent an arbitrary (not reasonable) interpretation of the statute. The claim that Rohde lacks standing because she did not file security for costs is feckless. See Resp at 4. The statute does not specify the amount of–or time for -- the deposit, which is why Rohde requested that the Circuit Court determine the amount so she could file security in her Complaint. See Amended Complaint at Wherefore ¶2. AAPS' effort to defeat standing on the theory that board membership changed or "demand implies urgency," see Resp. at n. 6, has no basis in the statute (or commonsense). It takes real gall to suggest that a public body can disregard the statutory demand on the grounds that individual members came and went. And it would be just as galling to negate Rohde's demand simply because she gave the board a reasonable time to drop the unlawful expenditure when collective bargaining agreements were renegotiated for, as AAPS well knows, it extends same-sex domestic partnership benefits in collective bargaining agreements, see Resp. at n. 1, and Rohde took for granted that by any reasonable interpretation of the statute, she would have to allow time for renegotiation of contracts (not breach of contract)–as AAPS implicitly concedes when it tries to manufacture an objection based on the *ex post facto* clause. See Resp. at 32.

Finally, the claim that Rohde does not have standing because she cannot show a legally protected interest, see Resp. at n. 7, cannot carry the day for AAPS. It is merely tautalogical (and

wrong) to the extent it turns on AAPS' assertion that Rohde did not satisfy the statutory requirements or that AAPS' use of public funds is not unlawful. Its wholly mistaken to the extent it claims that the statutory standing does not satisfy constitutional standing for, as the case cited by AAPS notes, statutory standing satisfies the constitutional requirement given the unlawful expenditure at issue. *See Nat. Woldlife Fed. v. Cleveland Cliffs*, 471 Mich. 608, 613 n.4 (2004). This is obvious if only because AAPS' approach, if accepted, would eviscerate statutory standing.

III. AAPS' Same-Sex Domesitic Partnership Benefits Policy Is Unlawful.

AAPSs can give no good (or legal) reason for this Court to take up the fool's errand it urges, disregarding the plain language of Article I, §25 in order to engage in vain speculation concerning what most people may have thought based on impressions supposedly held by various persons with varying agendas. As an initial matter, AAPS mistakes the whole thrust of the interpretive canon it cites because "[t]he cardinal rule of construction, concerning language, is to apply to it that meaning which it would naturally convey to the popular mind...." *Carman v. Hare*, 348 Mich. 443, 452 (1971)(citations and quotations omitted). Put another way, the "sense of the people" is to be found in the language of the amendment they approved. For this reason, of course, it is fundamental that "in analyzing constitutional language, the first inquiry is to determine if words have a plain meaning or are obvious on their face. If they are, that plain meaning is given to them," *see Silver Creek Drain District v. Extrusions Division, Inc.*, 468 Mich. 367, 375 (2003), and "it is not necessary to resort to extrinsic evidence in order to determine the meaning...." *See Bond v. Public Schools of Ann Arbor*, 383 Mich. 693, 700 (1970).

These canons foreclose the exercise in futility urged by AAPS because, as the Court of Appeals has already recognized, Article I, §25 was "clearly written using words that have a common,

everyday meaning to the general public." *Citizens For Protection of Marriage v. Board of State Canvassers*, 263 Mich. App. 487, 494 (2004). Indeed, AAPS' argument provides just one example of the sort of exercise in futility it would venture–since the very transcript it has attached shows the attorney for the group that sponsored Proposition 2 indicated it would bar benefits. See Resp. at Ex. C [at Ex E–transcript of proceedings before the Board of Canvassers], pp. 29 (lines 24-25) & 30 (lines 1-2). Thus AAPS' tendentious reading of the transcript it has attached makes clear the obvious: to contemplate the "trial" urged by AAPS is to immediately grasp its futility–and the grave risk it poses to the integrity of the political process.

The impairment of contracts and *ex post facto* clause arguments advanced by AAPS, see Resp. at 32, are insupportable (indeed frivolous). The reason is well known to AAPS: the relief Rohde seeks does not void existing contracts but merely prohibits AAPS from providing domestic partnership benefits in the <u>future</u>. See Amended Complaint at Wherefore ¶3.

AAPS' Equal Protection arguments are even more untenable. Resp. at 32. With respect to the state constitution, well settled canons of interpretation bar the absurd conflict AAPS seeks to create by turning one constitutional provision against the other. It is elementary that when interpreting the constitution "every provisions must be interpreted in light of the document as a whole, and one provision should not be construed to nullify or impair another. *In re: Lapeer County Clerk*, 469 Mich 146, 156 (2003). Even if there were a conflict between the provisions–which there is not–AAPS could not profit from it because "if there is a conflict between a general and a special provision in a constitution, the special provision must prevail in respect to its subject matter, since it will be regarded as a limitation on the general...", *see McDonald v. Schnipke*, 380 Mich 14, (1968), and also, "if conflicting constitutional provisions cannot be harmonized, the provision later adopted

controls." *See Advisory Opinion On Constitutionality of 1978 PA 426*, 403 Mich. 631, (1978). Put simply, these canons of constitutional interpretation compel the conclusion that Article I, §25 controls Rohde's claim that AAPS' recognition of same-sex "domestic partnership" for the purpose of providing benefits is unconstitutional.

The federal claim advanced by AAPS is just as groundless. The United States Supreme Court has already rejected claims that laws limiting marriage to a man and a women violate Equal Protection or Due Process. *See Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971)(rejecting, among other things, Due Process and Equal Protection claims advanced by persons with same-sex attraction seeking to marry and holding that law limiting marriage to heterosexual couples does not violate First, Eight, Ninth, or Fourteenth Amendments of United States Constitution); *see also Baker v. Nelson*, 409 U.S. 810 (1972)(dismissing petition for certiorari for want of a substantial federal question); *see also Hicks v. Miranda*, 422 U.S. 332 (1975)(dismissal for want of a substantial question is a disposition on the merits that binds all lower courts). Thus, *Baker*, precludes AAPS from litigating these issues since the United States Supreme Court has recently taken pains to emphasize that the *Baker* decision is not open to question. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003)(Case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.")

AAPS effort to avoid review by characterizing its domestic partnership benefits as a matter of "contract," not legislation, defies the law. The argument utterly fails at the outset to the extent AAPS believes that PERA or its general power to contract can trump constitutional limitations for it is obvious that no statute can authorize that which the constitution forbids. Furthermore, it is painfully obvious that the Defendants "contract exception" argument must be rejected because

AAPS' must contract consistent with state law. *See e.g. City of Hazel Park v. Potter*, 169 Mich. App. 714 (1988)(contract between city council and city manager was void as against statutory structure giving city council authority to appoint and remove public officers); *see also Mino v. Clio School Dist*, 255 Mich. App. 60 (2003)(confidentiality clause of severance agreement between school and superintendent is contrary to state law and therefore void). Indeed, the notion that the Defendants could circumvent state law by means of contract is absurd because it proves too much: if preemption principles do not restrain the exercise of AAPS' general powers (including its power to contract) then AAPS could recognize same-sex marriages by contract without even the need for the affidavit of (same-sex) "domestic partnership." It is also obvious that the contracts providing the domestic partnership benefits reflect the AAPS' policy decision to provide same-sex "domestic partnership" benefits–so retreating to contracts that reflect the policy cannot defeat the claim. *See* Amended Answer at ¶8; *Cf. Feaster v. Portage Public Schools*, 451 Mich. 351 (1996)(district policy which required custody by legal guardianship imposing requirement not included in School Code was void); *Snyder v. Charlotte Public School Dist.*, 421 Mich. 517 (1985)(district policy requiring full-time attendance to attend classes offered by public schools imposing requirement not mandated by School Code was void); *see also Rowley v. Garvin*, 221 Mich. App. 699 (1997)(local school policy defining "full time" student could not be used to define "full-time" student for purpose of state law governing postmajority support where state law defined term).

At the end of the day the AAPS' herculean efforts to evade review are understandable given the plainly unlawful nature of their "domestic partnership" benefits policy. After all, it is absurd to suggest that AAPS has the power to define, recognize, and subsidize same-sex "domestic partnerships" when Michigan law prohibits the recognition of same sex marriages. AAPS'

transparent circumvention of state law must be rejected because in this state, at least, the law focuses on substance–not form. *See e.g. Wilcox v. Moore*, 354 Mich 499 (1958)(Court looks at substance of transaction, not form, for purpose of applying usury statute); *K&K Woodworking, Inc. v. Mich. Emp. Sec. Com'n*, 206 Mich. App. 515 (1994)(Court looks at substance, not form, to determine successor liability for purposes of workers' comp statute); *Blessing v. Zeffero*, 149 Mich. App. 558 (1986)(whether a transaction is a business or agricultural loan within meaning of National Bank Act turns on substance not form of the transaction and courts are not bound by parties' characterization). This state, and hence its political subdivisions, cannot recognize (never mind subsidize) same-sex marriages. And a same-sex marriage by any other name–including "domestic partnership"–is a same-sex marriage.

CONCLUSION

Rohde's Application For Leave To Appeal should be granted. The questions presented by Rohde's Application concern issues providing grounds for review under MCR 7.302(B)(1)-(3). State law plainly authorizes Rohde's suit to challenge AAPS' unlawful use of public funds to purchase same-sex "domestic partner" benefits, the Court of Appeals has placed insupportable limitations on the statute (impeding the statutory purpose), and the result in this case is to undermine the constitution and laws of this state protecting marriage.

Respectfully submitted,

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